IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 29 OF 2007

Shri Fredy Fernandes,
s/o Joaquim Fernandes,
aged 30 years,
r/o Sawantwado, Palolem,
Canacona, Goa. ... Applicant

versus

State
(through the Public Prosecutor) ... Respondent

Mr. Nitin Sardessai, Advocate for the Applicant.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 12TH OCTOBER, 2007.

ORAL JUDGMENT

Heard Mr. Nitin Sardessai, learned Counsel on behalf of the Applicant/Accused and Mr. C. A. Ferreira, learned Public Prosecutor on behalf of the Respondent.

2. This revision is filed by the accused who has been convicted under Section 324 IPC by Order dated 22-3-2006 of the learned J.M.F.C., Canacona and whose conviction has been upheld by the learned Sessions Judge by his Order dated 3-1-2007.

3. The accused was charged and tried with the allegation that on 30-8-2001 at about 21.45 hours at Palolem the accused assaulted the Complainant Rajnikant Kankonkar/PW2 with a broken glass pepsi bottle and caused head injuries to him and also gave bad words to the said Complainant. The accused has been acquitted under Section 504 I.P.C. but has been sentenced under Section 324 IPC to undergo S.I. for a period of one month and to pay a fine of Rs. 5000/- in default of payment of fine to undergo S.I. for 15 days.

4. Learned Counsel on behalf of the accused contends that there was no reason for the accused to be convicted under Section 324 IPC and that the element that the bottle was a glass bottle was introduced subsequently and therefore could not have been accepted. Learned Counsel further submits that when the Complainant gave his complaint the Complainant did not refer to the pepsi bottle as that of glass and therefore the accused could not have been convicted under Section 324 IPC. Learned Counsel further submits that the glass pieces which were apparently attached were not sealed. Learned Counsel further

submits that there were also two versions as to when the complaint was lodged and as such the case of the said Complainant could not have been accepted, as free from doubt.

5. At the outset, it must be noted that this is a revision petition against two concurrent findings given by the Courts below holding the accused guilty under Section 324 IPC. As stated by the Apex Court in **State of Maharashtra** v. **Jagmohan Singh Kuldip Singh Anand and others**((2004) 7 SCC 659) the revisional power of the High Court cannot be exercised as second appellate power and the High Court is required to exercise self-restraint in a revision under Section 397 of the Code. The High Court is not entitled to embark upon an in-depth re-examination of the oral and medical evidence and come to a conclusion, contrary to the consistent one reached by the two courts below.

6. The above observations of the Apex Court are squarely applicable to the case at hand. The Complainant had clearly stated in his evidence before the Court that he was assaulted by the accused with a glass bottle. There is no doubt that the Complainant had not referred in his complaint lodged on the same day to the bottle as a glass bottle but this aspect was clarified two days later when his supplementary statement was recorded on 2-9-2001. I do not think there was any particular reason for the Complainant to have referred to, at the very first instance, when he stated that he was assaulted with a pepsi bottle to say that he was

assaulted with a pepsi glass bottle. Moreover, if the said pepsi bottle was a plastic bottle, as sought to be contended on behalf of the accused, a hit with the same would not have caused a wound on the head of the said Complainant which has been certified by Dr. Jose Tavares/PW1. Moreover, in case the bottle with which the accused was assaulted was a plastic bottle the accused would not hit the same on the iron gate, as stated by the Complainant and other witnesses and on account of which there were glass pieces fallen. There have been also other eye witnesses to the incident, all of whom have clearly stated that the Complainant was assaulted with a pepsi glass bottle and both the Courts below have accepted the said evidence and has convicted the accused as aforesaid. The contention that the said Complainant was assaulted, if at all with a plastic bottle cannot be accepted. As regards the date when the complaint is made, there is absolutely nothing in the cross-examination of the said Complainant from which doubt could be created that the complaint was lodged not on 30-8-2001 but on some other date. The Complainant has been very clear and consistent that his complaint was lodged on the same date i.e. on 30-8-2001 and his supplementary statement was recorded on 2-9-2001. Both the Courts below have rightly accepted the prosecution evidence and convicted the accused under Section 324 IPC.

7. As regards the sentence, learned Counsel on behalf of the accused contends that at the time of commission of the offence the accused was 23 years old and at present the accused is 29 years old. Learned Counsel on behalf of the

accused further submits that the accused has no bad antecedents and there is nothing on record as regards the adverse conduct of the accused subsequent to the offence. Learned Counsel further submits that the accused is not yet married and is gainfully employed as a seaman and in case the accused is directed to undergo the imprisonment imposed upon him, that would certainly come in the way of the marriage prospects of the accused.

8. The learned trial Court accepted that the accused was a first offender and it further accepted that Section 324 IPC did not make imposition of imprisonment compulsory. However, the learned trial Court observed that in case the accused is let off by imposing fine only, it will boost the confidence of the accused and in order to deter the accused punishment was required to be imposed. The learned trial Court in imposing the said punishment observed that the circumstances, the situation, the weapon, the part of the body and its effect on the bystanders had also to be seen.

9. On the other hand, learned Public Prosecutor submits that in the case at hand, a broken bottle was used and that too in an incident which did not take place on the spur of the moment and therefore the sentence imposed by the learned Magistrate need not be interfered with.

10. The learned Sessions Judge also denied the benefit of the provisions of the Probation of Offenders Act, 1958, which is in force in this State stating that this was not a fit case to release him by giving him the said benefits.

11. On behalf of the accused, reliance has been placed on **State of Maharashtra** v. **Jagmohan Singh Kuldip Singh Anand and others**(supra) wherein the Apex Court extended the benefit of Section 4 of the Probation of Offenders Act, 1958 in a case under Sections 324 and 452 r/w Section 34 IPC considering that the incident had taken place in a fit of anger over trivial matter and both the parties are educated and also distantly related and the incident was 10 years old.

12. In the case of **Ramdas Maroti Thakur** v. **State of Maharashtra**(2005(2) Mh.L.J.) 453 a Division Bench of this Court extended the benefit of Section 360 of the Code of Criminal Procedure to an accused who was 21 years of age and who was convicted under Sections 325 and 323 IPC. The Division Bench also took note of the fact that for 11 years when the accused was on bail during the pendency of the appeal there was no report of any misuse of bail granted to him nor there was any complaint of any other offence committed by him and considering the age, the character and the antecedents of the accused, the learned Division Bench thought fit to extend the benefit of Section 360, Cr. P. C. to the said accused.

13. Learned Counsel on behalf of the accused has also referred to, two other cases, namely, **Shri Pradeep Mashelkar** v. **State**(2006(1) Goa L.R. 109) and **Shri Namdev Toraskar** v. **State**(Criminal Revision Application No.14 of 2007 decided on 3-5-2007). In the first case, the accused was sentenced under Section 324 IPC to undergo S.I. for one day-till rising of the Court and in addition each of the accused were directed to pay compensation to the Complainant and other injured witnesses and in default were directed to undergo S.I. In the second case, the period undergone by the accused for five days was considered as sufficient substantive sentence undergone by them and in addition the accused were imposed fine under Section 452 IPC.

14. Reverting to the facts of this case, there is nothing in the evidence of the said Complainant to suggest that the incident was premeditated. As per the Complainant himself he did not know why the accused had assaulted him. The Complainant has stated that the accused had come abusing him, removed a pepsi bottle, broke it on the gate and assaulted him on his head. The medical evidence shows that the said Complainant had two wounds on the left temporal region and an abrasion on the forehead which were caused by a blunt object. Although the accused broke the said bottle on the gate and converted it into a stabbing weapon, the accused did not assault the Complainant with the broken end of the bottle. It is certainly not the case of the Complainant that the accused did so. The injuries

have been described as simple in nature. As already noted by the learned Magistrate, the accused was 23 years of age and otherwise was a first offender. The accused is also stated to be unmarried and it has been submitted by the learned Counsel that substantive sentence may come in the way of the marriage prospects of the accused. This submission needs to be accepted in the facts and circumstances of this case.

15. There is no doubt that punishment to be inflicted must always be proportionate to the crime committed though in law there are no golden scales to measure the same. At the same time, it has got to be deterrent in nature.

16. Considering the overall facts of the case, in my view, ends of justice would be met by modifying the sentence imposed by the learned Magistrate. Accordingly, the accused shall undergo S.I. for one day-till rising of the Court and the accused shall pay to the Complainant compensation of Rs.15,000/-.

17. After his return from board the ship, the accused shall surrender before the learned Magistrate to undergo the said sentence. In default of payment of compensation of Rs.15,000/- the accused shall undergo one month S.I.

18. In view of the above, the revision is partly allowed. The conviction under Section 324 IPC is maintained. The sentence is modified, as above.

N. A. BRITTO, J.

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